SEP 11 1980

MICHAEL RODAK, JR., C:

No. 79-404

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA,

Petitioner,

v.

JESUS E. CORTEZ AND HERNANDEZ-LOERA,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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BRIEF FOR JESUS E. CORTEZ, RESPONDENT

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QUESTION PRESENTED

Is the requirement, that a founded suspicion is necessary before a vehicle on the open highway may be stopped and searched, satisfied if the Agents have a hunch that there will be illegal activity.

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STATEMENT

Jesus E. Cortez raised two issues in his appeal to the Ninth Circuit Court of Appeals. The first is the issue herein, and the second concerned a jury instruction.

The Court of Appeals felt it was not necessary to reach the jury instruction issue because of its ruling on the issue of the stop.

FACTS

A) The Site

All of the matters related to in this case took place in the southern central portion of the State of Arizona

within approximately fifty miles of the Arizona-Mexico border. This area consists of some towns, a number of Indian villages, and Sells, Arizona, which is the headquarters of the Papago Indian Reservation. Exhibit A, which is a map and which is attached to the Response to the Petition for Certiorari to the United States Court of Appeals for the Ninth Circuit, shows this entire area. Tucson, Arizona is a short distance east of this area, and Phoenix, Arizona, is to the north. According to the testimony of the Agents in this case, the entire four hundred miles of the Arizona-Mexico border area is used for illegal alien traffic.

There are two highways in this area that are referred to in this case, and they are: Highway 86, which is an east-west road going from Tucson, Arizona westernly for approximately 100 miles to the town of Why; and Highway 286, which is a north-south road and goes from the town of Three Points south for forty-six miles to the town of Sasabe which is on the Arizona-Mexico border. Highway 286 intersects with Highway 86. Midway along Highway 86 one can turn north on Highway 15 and this road leads to Phoenix, Arizona. Between Three Points and Sells, on a side road that connects with and which is just off Highway 86 is the world reknown Kitt Peak National Observatory.

B) Prior Investigations

On December 4, 1976, Agent James Rayburn, a Border Patrol Agent, was assisting other Border Patrol Agents process a group of illegal aliens at Casa Grande,

Arizona. While he was doing this, the Agents showed him a footprint in a Chevron design, and told him that this was the person who another group of aliens had identified as being the man who guided them (J.A. 21). There was no information as to when this had happened (J.A. 37).

Wayne Gray, another United States Border Patrol Agent, stated that he first saw the Chevron track on Tuesday, January 4th, 1977. He encountered it at milepost 119 and followed the track until milepost 122 where it ended (J.A. 51). He also saw an older set of tracks which he estimated were a week old (J.A. 55). He thought the newer set of tracks to be a day or two old (J.A. 55).

On Sunday, January 16, 1977, Agents Rayburn and Gray were again in this area and followed tracks through the desert for some miles until they came to milepost 119. From there the tracks ran parallel until they came out on the road at milepost 122. While they were following these tracks they saw another set of tracks that Officer Rayburn guessed were three or four days old. However, he went on to say it was difficult to tell how old the older tracks were as there had been a rain between the time the tracks were made and when they were observed by him (J.A. 24). On cross-examination he said he really could not tell how old this track was (J.A. 47). Agent Gray estimates these same tracks to be five days to a week old (J.A. 58). The older tracks were approximately 150 feet apart from the newer tracks. The newer tracks were one day old.

From the tracks that Agent Gray saw on the 16th, he assumed that the aliens would be walking in an easterly direction after they arrived on the highway, and that the vehicle that picked them up would be traveling in the same direction (J.A. 59). He went on to say that as to both the old and new sets of tracks he saw on January 16th he could not say where the vehicle that picked the aliens up had come from or was going to after the pickup (J.A. 92).

C) The Prior Tracks—When They Were Made

Agent Gray said that on Tuesday, January 4th, he saw two sets of tracks and one was a day-old and the other was *approximately* a week old. (The Government's footnote 4 in its Brief is erroneous when it states that a track was found on January 4th. Agent Gray testified that the track had been discovered on January 3rd by a border pilot named Akin who reported the track (J.A. 52)).

Agent Rayburn said that on Sunday, January 16th he saw two sets of tracks. One set was a day old. The other set *could have* been three or four days old, which would be a Wednesday or Thursday, but he really did not know how old since there had been a rain in the area after the tracks had been made.

Based on the above, the Agents testified (J.A. 60), and the Government argues, there is a showing of a weekend pattern of alien traffic. A critical perusal of their testimony shows that alien traffic, based on the

tracks they personally saw, could have been made as easily on one day of the week as almost any other.

D) Time When Aliens Would Travel

The Agents stated that they *assumed,* and the Government argues, that the aliens would arrive at milepost 122 between 2:00 and 6:00 a.m. on January 31st. This was predicated upon their *assumption* that the aliens would start traveling around 6:00 o'clock the previous evening. Agent Gray, who knew of occasions where groups of aliens crossed the border during the daylight hours (J.A. 86), admitted that if the aliens started traveling at 3:00 or 4:00 o'clock in the afternoon they would have arrived before any of the Agents were set up for observation (J.A. 85).

Furthermore, the Agents testified that they had no knowledge of any observation of aliens on the route on January 30th (J.A. 85). In fact, the last time any Agent had gone to the vicinity of milepost 122 was on January 16th, 1977. The Agents just assumed that the aliens would travel between 2:00 and 6:00 a.m. and arrive at milepost 122. Not even the captured aliens led by Chevron reported that they arrived at milepost 122 between 2:00—6:00 a.m.

E) Direction of Pickup Vehicle on Earlier Occasions

Agent Wayne Gray testified that the tracks he followed on January 16th led to the *inference* that the aliens were walking in an eastward direction after

reaching the highway and *apparently* the vehicle would be going in the same direction. However, on cross-examination, he said he could not tell in which direction the vehicle was heading when it picked up the aliens who left the tracks he saw on January 4th and 16th (J.A. 92). He said the vehicle could have come from Casa Grande and picked up the aliens and returned to Sells (J.A. 92). He had no information that the pickup vehicle was coming from Tuscon (J.A. 92).

Notwithstanding this testimony, the Government in its Statement of Facts in its Brief states that the Officers *concluded* that the previous group of aliens had been picked up by a vehicle that *probably* approached them from the east and returned to the east. The Government cites J.A. 59 and 84 as supporting this assertion, but a close reading of those pages shows that the Government has misread them. The Agents did not so testify. In fact, Agent Gray testified they watched vehicles going in both directions (J.A. 64). This obviously belies the conclusion of the Government.

F) Type of Vehicle—Profile

Agent Wayne Gray testified that he was looking for a vehicle that would hold eight to twenty people. This could be a van, pickup, camper shell, U-Haul, motor home, trailer or any vehicle of this nature (J.A. 63), but for some reason this did not include commercial linen trucks (J.A. 64) or sedans (J.A. 79). He stated that he had a vehicle profile (J.A. 78) and he was going to

search every vehicle within the profile that traveled west and returned east between 2:00 and 6:00 a.m. (J.A. 78).

The Government now claims for the first time that there was no vehicle profile in this case. This claim is made even in view of the fact of the Agents' testimony referenced to above and to the fact that the Government in its Brief in the United States Court of Appeals for the Ninth Circuit (at page 12), stated that the vehicle which the Agents observed at 4:30 a.m. fit their profile.

G) January 31, 1977

The Agents testified that they *assumed* the aliens would travel at night and would not travel in inclement weather. They stated that on the previous three days it had been either rainy or inclement. On January 31st there was moonlight and the Agents set themselves up at an elevated position at milepost 149, near Three Points, Arizona, in order to be able to watch Highways 86 and 286 (J.A. 61,89), from one location (J.A. 114). They watched both highways because they had no idea of the vehicle's route. On earlier occasions (January 4th and 16th) when they had seen the Chevron tracks they did not know in which direction the vehicle that picked the aliens up was heading (J.A. 92).

Agent Gray testified that they had a vehicle profile that included any vehicle capable of holding eight to twenty aliens and that would not draw attention (J.A. 63, 78, 79). This included vans, pickups, camper shells, U-hauls, motor homes, trailers or some type of vehicle of this nature, but did not include linen trucks (J.A. 63,

64) or sedans (J.A. 79). The Agents *estimated* that it would take a vehicle approximately one hour and a half to go from their location at milepost 149 to the vicinity of milepost 122, pick up aliens, and return to milepost 149. They intended to stop and search any vehicle in the above category that made this return trip in about an hour and a half between 2:00 a.m. and 6:00 a.m. (J.A. 78). Interestingly, they did not intend to stop sedans even though they knew that aliens had been put in sedans (J.A. 79). They also did not stop linen trucks that went by them, and in fact, they didn't even bother to determine whether the linen trucks ever came back (J.A. 90). The Agents had no knowledge, but *assumed*, that aliens had crossed the border in the early evening of January 30, 1977. They also had no knowledge as to what type of vehicle was to be used to pick up the aliens (J.A. 92). There was no observation by any Agent of the suspected route on this day (J.A. 85) and the records do not indicate any observation since January 16th.

At approximately 4:30 a.m. one Agent saw a pickup with a camper shell pass going westward. Agent Gray, who had gotten very close to the highway so that he would be able to try and see the license plate and got a partial reading of the plate — GN 88, but he was unable to give a description of the vehicle insofar as its color was concerned because of the darkness. The only light he had was moonlight (J.A. 66). However, Agent Evans, who was further away according to Agent Gray, but who said he was closer, testified that the vehicle was greenish-yellowish (J.A. 103). When they finally pulled

the vehicle over, Agent Evans got out with a shotgun in his hands (J.A. 104). Agent Gray said that after he pulled over Defendant's vehicle the driver got out and went to the rear of the vehicle. At the same time Agent Gray saw someone look out of the rear window (J.A. 68). He then stated he asked the Defendant Cortez a few questions and then Cortez, without being asked, opened the rear of the camper (J.A. 70).

The testimony of Jesus Cortez was that he had come to this location by starting in Phoenix where he had taken Interstate 10 to Casa Grande and then came down Highway 15 until it intersected with 86 and then proceeded in an easterly direction on Highway 86. He thought his license number was CN 8804. He further testified that when he was stopped he was told to open the camper which he did (J.A. 122). As a result of this, the evidence sought to be suppressed was discovered.

SUMMARY OF ARGUMENT

A founded suspicion is now and ought to continue to be required before a vehicle may be stopped and searched. The Government would like to be able to have a stop and search of an automobile based on a good hunch. For their purposes it doesn't matter if a good hunch is a new category or if this Court expands the existant category of founded suspicion so as to include hunches.

The Government obviously does not like the test of *United States* v. *Brignoni-Ponce,* 422 U.S. 873, 45 L.Ed 2d 607 at 617, 95 S. Ct. 2574, which requires specific ar-

ticulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicle contains illegal aliens. It would rather see the Court modify the test so that vehicles may be stopped and searched for illegal aliens if they are found fairly near the border at night, and the agents don't recognize the vehicle as being from the local area. (It may be being too charitable to include — at night). The Government does not want to be tied down to articulable facts — they want to be able to use hunches, and a hunch by any other name is still a hunch. In view of the fact that the Government did not have probable cause nor a founded suspicion for the stop and intended search of the Cortez vehicle, the stop was illegal.

ARGUMENT

RESPONDENTS' FOURTH AMENDMENT RIGHTS WERE VIOLATED WHEN BORDER PATROL OFFICERS STOPPED THE CAMPER IN WHICH THEY WERE RIDING

A) Minimal Intrusion

Automobile traffic is a basic and necessary mode of travel. *Delaware* v. *Prouse,* 440 W. 648 at 662, 59 L. Ed. 660 at 673, 99 S. Ct. 1391. This is particularly so in the southwest desert area.

Wayne Gray, a United States Border Patrol Agent, testified on cross-examination, that it was his intent to stop and search every single vehicle that met his vehicle profile between the hours of 2:00 and 6:00 a.m. that

passed him going west, and then returned in an easterly direction (J.A. 78). Notwithstanding this testimony, the Government argues that the stopping of the Respondent's vehicle contemplated minimal intrusion, and now asserts for the first time that the express limited purpose of the stop was to question the occupants of the vehicles about their citizenship and immigration status.

The stopping of a vehicle on the open highway, and a subsequent search, amounts to a major interference in the lives of the occupants. *Colidge* v. *New Hampshire*, 403 U.S. 443, at 449, 29 L. Ed 2d 564, 590, 91 S. Ct. 2022. In *United States* v. *Brignoni-Ponce, supra,* this Court said that a vehicle may be subjected to the minimal intrusion of a brief stop in order for an officer to ask questions, but not for the purpose of searching the vehicle.

In footnote No. 6 of *Brignoni-Ponce, supra,* the Government informed this Court that its roving patrols now search vehicles only when they have probable cause to believe that they will find illegal aliens or contraband. Obviously that policy did not last very long.

B) Probable Cause

Speaking of probable cause, now comes the Justice Department and asserts that probable cause existed to believe that Respondents were smuggling aliens at the time and place when they were stopped (Government's Brief, p. 11).

The Government has never previously argued probable cause for the stop as can be seen from the following:

(1) In the Government's Opposition to the Respondent's Motion to Suppress in the Trial Court, the Government did not then argue that there was probable cause for the initial stop. Instead, the Government stated probable cause existed after the stop was made and the Agents had asked questions;

(2) The Government in its Answering Brief in the Ninth Circuit, again did not argue that there was probable cause to stop the vehicle; and

(3) In its Petition for Rehearing with Suggestion for Rehearing En Banc, in the Ninth Circuit, it again argued founded suspicion and not probable cause for the stop.

However, if the Government now wishes to argue that there was probable cause for the stop they should be allowed to do so, provided they are held responsible for all the ramifications and consequences of this position. If probable cause existed to stop the vehicle, it existed and was based on information which had been fully gathered by January 16, 1977. No new information was acquired from that date until the time of the stop. Having two weeks time, the Government should have attempted to obtain advance judicial approval for their decision to conduct searches on Highways 86 and 286 on the early morning of January 31st between the hours of 2:00 and 6:00 a.m. This seems to be the situation Justice Powell was referring to in his concurring brief in

Almeida-Sanchez v. *United States,* 413 U.S. 266, 37 L.Ed 2d 596, 93 S.Ct. 2535 (P. 608 and footnote 4 at 609). See also *United States* v. *Brignoni-Ponce,* footnote 7, P. 617.

Since the Government had, as it now claims, probable cause for the stop, then the decision of the Ninth Circuit should be affirmed because the Government had ample time to seek a search warrant. Having failed to do so, and failing to show that it was impractical to do so, the stopping and intended search of the vehicle was in violation of Respondent's Fourth Amendment Rights. *Terry* v. *Ohio,* 392 U.S. 1, 20 L. Ed 889, at 905, 88 S. Ct. 1868.

Surely, two weeks is a reasonable time to go to the United States Magistrates in Tucson (which is only forty-five miles from Sells) and attempt to obtain this type of warrant. There would have been a number of options open to the Magistrate: (1) find no probable cause based on the facts and refuse to sign the warrant; (2) find probable cause but refuse to issue search warrant because he felt that he could not issue an area warrant; or (3) find probable cause and issue an area warrant but limited in its area, time and scope. The Magistrate would necessarily have to limit (a) the type of vehicle to be stopped; (b) the section of the highway to be included in the area; (c) the hours, and (d) the days. The Magistrate would also have to decide if in addition to a stop whether a search could be made of the vehicle and, if so, its scope.

This Respondent submits that the Magistrate would have refused to issue the warrant for the primary reason

that, based on the facts known to exist to the Agents, they did not have probable cause to stop Respondent's vehicle. The facts known are just as lacking in probable cause as those in *Dyke* v. *Taylor Implement Mfg. Co.*, 391 U.S. 216, 20 L.Ed 2d 538, 88 S. Ct 1472, where a car was seen driving by the home of Lloyd Ducket. Shots were fired from the car into the home. People standing in the front yard fired back at the car with a pistol, and thought that they hit the back of the car. One of them informed the Sheriff and shortly thereafter a Deputy Sheriff received this information on his radio, and he spotted a suspicious car and followed it. The car raced away but was stopped by a policeman in a nearby city. In the vehicle was found an air rifle. The court found that the search of the vehicle violated Petitioner's Fourth Amendment right. The court said that on the record before them neither the Sheriff nor any of the officers who assisted in the search had reasonable or probable cause as to believe that evidence would be found in the car. The only thing the officer knew was that he chased an old-make model car, that it had speeded up when he chased it, and that it contained a fresh bullet hole. The court found this insufficient to justify a conclusion that the car was searched with reasonable or probable cause to believe that the search would be fruitful.

The description of an 'old-make model car' is narrower than the vehicle in our profile as both new and old make model cars are in our profile.

In the instant case, the Agents simply did not have enough information to obtain a warrant. A close look at

the evidence shows that the following facts existed at 6:12 a.m., on January 31, 1977, and were known to the Agents:

1) Aliens are smuggled across the Arizona-Mexico border;

2) Agents were in an area that was within fifty miles of the border;

3) The Agents had been told by other Agents, that a man who guided aliens from Mexico had a Chevron print in his shoe tracks, and that on a case the other Agents had previously handled (at an unspecified time) the aliens had identified that man as having been the man that guided them off Highway 86 (J.A. 21);

4) On January 4th and 16th, Agents saw both a fresh and an old set of tracks. In each set of tracks there was a Chevron design;

5) It had rained, or the weather had been inclement on the three previous days to January 31st.

6) The Agents saw a pickup vehicle go by them at approximately 4:30 a.m. in a westernly direction, and thereafter saw it return one hour and forty-two minutes later.

The testimony shows the Agents made the following assumptions when they set up their observation point at 2:00 a.m.:

1) There would be an illegal alien crossing after the bad weather;

2) It would be near a weekend;

3) The aliens would be picked up by a vehicle either going in an easterly or westerly direction;

4) The vehicle would travel between 2:00 a.m. and 6:00 a.m.;

5) The vehicle would be large enough to hold between eight to twenty aliens.

The evidence shows that the Agents lacked information as to certain key matters:

1) The Agents had no information that there would be any aliens smuggling on the night in question;

2) The Agents had no knowledge that aliens had crossed the border in the early evening of January 30, 1977 (J.A. 85);

3) The Agents had no knowledge of what particular vehicle would pick the aliens up (J.A. 63);

4) The Agents had no knowledge as to what direction the vehicle would travel before or after it picked up the aliens (J.A. 92);

5) The Agents did not notice any suspicious activity regarding the vehicle before the stop.

All of the above raises certain questions:

1) If the Agents really believed that a vehicle would pick up aliens between milepost 119 and 122 why did they station themselves 27 miles away at milepost 149 so that they could observe both Highway 286, at the road coming from Sasabee, as well as Highway 86? Why didn't they set themselves up at approximately milepost 122 and thereby narrow the scope of the area to be included in their search area?

2) If the Agents really believed the smuggling would take place on or near a Sunday, why didn't they go out to the area around Sunday, January 23rd, which was the first Sunday after January 16th?

3) Why didn't they check the area for tracks during the two-week period between January 16th and January 31st?

4) Since Sells, Arizona, on Highway 86, is the center of the Papago Indian Reservation and obviously has much vehicular traffic as does the Kitt Peak Observatory, which is just off Highway 86, and which can only be reached from Highway 86, why didn't the Agents exclude these two sites? Common sense indicates these sites should have been excluded because the Agents knew that the Kitt Peak telescopes

> are primarily used at night and by 6:00 a.m. the sky is starting to get light. Surely it is to be expected that after a night of using the telescopes that people would be coming from Tucson to pick up astronomers, technicians or other employees. By simply narrowing the areas the Agents could easily have excluded Sells and Kitt Peak.

An examination of the above leads to the conclusion that neither probable cause nor founded suspicion existed when the Agents decided to stop Respondent's vehicle.

c) Founded Suspicion

A founded suspicion requires that there be some specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain illegal aliens. *United States* v. *Brignoni-Ponce, supra.* In that case this court pointed out factors to be considered. It said consider (1) information about recent border crossings (in the instant case they were two weeks old); (2) erratic driving or evasive driving (there was none in this case); (3) aspects of the vehicle (our profile includes every vehicle but sedans and some commercial vehicles); (4) vehicle appears loaded (not in the instant case); and (5) Agents recognize persons in vehicle as Mexicans (in the instant case the Agent couldn't even see the driver (J.A. 81) or the occupants (J.A. 82) before the stop.

Terry v. *Ohio,* 392 U.S. 1, 20 L.Ed 2d 889, 88 S. Ct. 1868, involved an on-the-street confrontation bet-

ween a police officer and an individual whose activities raised his suspicions, and who he feared might have a gun. The court discussed dealing with a rapidly unfolding and dangerous situation on city streets and allowed a stop for questioning and a search for a weapon if there is a suspicion that the person is armed. This court said that the test for this stop and frisk was if the facts available to the officer when judged against an objective standard lead to the belief that the action was warranted. The court went on to say that it would not sanction hunches as a substitute. In *Adams* v. *Williams,* 407 U.S. 143, 32 L.Ed 2d 612, 92 S. Ct. 1921, the test was satisfied when the officer had been told by an informant that the defendant was seated in a car nearby and that he was carrying narcotics and had a gun at his waist. The officer went to the defendant and asked him to open the door. When the defendant instead rolled down the window, the officer reached in and took the gun from his waist.

The facts in *Terry* and *Adams* are entirely different from the instant case. Our facts are more akin to those in *Brown* v. *Texas,* 443 U.S. 47, 61 L.Ed 357, 99 S. Ct. 2637, and *Reid* v. *Georgia,* No. 79-448 (June 30, 1980).

In *Brown* v. *Texas, supra,* an officer saw two men who he believed had been together or were about to meet, and saw them walk off in a different direction. The officer asked the Appellant to identify himself and to explain what he was doing there. The Appellant refused. The officer said that this particular area of El Paso was a high-drug problem area. The officer also

said that the defendant looked suspicious and he had not seen that subject in the area before.

This Court found the stopping was unconstitutional since the Appellant's activity was no different from that of other pedestrians in the neighborhood. There was no basis to suspect Appellant of any misconduct.

This Court said that you must weigh the gravity of the public concern served by this seizure, and the severity of the interference of the individual's liberty. The reason for this balancing to to assure that "an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field." (P. 362)

In *Reid,* the Petitioner arrived at the Atlanta airport in the early morning hours, and was seen leaving the plane by DEA Agents. They observed him separated from another man who was carrying a shoulder bag like the one that Petitioner carried. As they proceeded through the concourse, the Petitioner occasionally looked in the direction of the other man, and when they reached the main lobby, the other man caught up with the Petitioner and they spoke briefly. They then left the terminal together and were stopped outside by a DEA Agent who found that the airline tickets for both of them had been purchased with Petitioner's credit card and further showed that they had stayed in Ft. Lauderdale only one day. The Agent said the man appeared nervous and was asked to return with him. When they entered the terminal Petitioner dropped his shoulder bag and ran. The bag contained cocaine.

Based upon the following evidence this court found the stop impermissible:

1) Petitioner arrived in Ft. Lauderdale, which is a place where a great deal of cocaine is sold; and

2) It was in the early morning when most law enforcement activity is diminished;

3) Petitioner's companion appeared to be hiding the fact that they were traveling together; and

4) They had no luggage other than shoulder bags.

This court concluded that the agent could not, as a matter of law, have reasonably suspected the Petitioner of criminal activity on the basis of these observed circumstances. The court said of the evidence relied upon only the fact that the Petitioner preceded another person and occasionally looked backward at him as they proceeded through the concourse relates to their particular conduct. The other circumstances fit a large category of presumably innocent travelers who would be subject to virtually random seizures were the court to conclude that with as little foundation as there was in this case it could justify a seizure. The court went on to state, citing in part, *Terry* v. *Ohio, supra,* at 27-28:

> "The agents belief that the Petitioner and his companion were attempting to conceal the fact that they were traveling together, a belief that was more an 'inchoate and unparticularized suspicion or 'hunch', than a fair inference in the light of his experience, is simply too slender a reed to support the seizure in this case.'"

The Court found that the Petitioner was illegally seized.

In *Delaware* v. *Prouse, supra,* this court said:

> "The marginal contribution to roadway safety possibly resulting from a system of spot checks cannot justify subjecting every occupant of every vehicle on the roads to a seizure — limited in magnitude compared to other intrusions but nonetheless cognizable — at the unbridled discretion of law enforcement officials." P. 672.

Comparing this language to the instant case, we see officers, who, looking for aliens, are prepared to stop and search virtually any vehicle making a round-trip within an approximate time span of one and one-half hours. It is obvious that many innocent people could be making that round trip. Examples of this are:

1) Someone going from Tucson to Sells to either pick someone up or drop them off and then return to Tucson;

2) Someone going to Kitt Peak National Observatory to take Astronomers or others to the telescopes or going there to pick them up after a night of viewing;

3) A vehicle traveling on Highway 86 going to Ajo or to the border crossing at Lakeville in order to enter Mexico to go camping or fishing at the resort area of Puerto Penasco (Rocky Point);

4) Someone going to Organ Pipe Cactus National Monument (just south of Why, Arizona); and

that vehicle having car trouble and deciding to return to Tucson.

Since it does not suit the Government's position they argue that an innocent explanation for the trip is unlikely. It doesn't take much imagination to see the Government in another case arguing any of the above possibilities to be an innocent explanation if to do so would suit their purpose. This is your basic — 'use it if it helps' and 'ignore it if it hurts' tactics. There has been much of this throughout the Government's brief. In addition to examples previously mentioned herein, the Government at footnote 9 of its Brief states that Cortez voluntarily opened the door of the camper. They make this seem like an undisputed fact. They don't mention his testimony where he stated he was told to open the camper by the Agent (J.A. 122). Their brief neglects to point out that the Agents who were supposedly sure that aliens would be picked up at milestone 122 stationed themselves at an elevated point 27 miles down the road so that they could watch both Highway 86 and Highway 286 (J.A. 61, 89 and 114). The Government doesn't mention that the Agents didn't stop linen trucks that certainly were capable of carrying eight to twenty aliens and didn't even keep track of them (J.A. 64,90), and, finally, the Government never mentions that Agent Evans, after the stop, exited his vehicle and held a shotgun in his hands (J.A. 104).

At the least the Government is guilty of not reading the transcript of the Motion to Suppress closely, and at the most they are guilty of intentionally misstating and ignoring the facts.

At all times it must be remembered that these Agents intended not only to stop every vehicle in their profile but they also intended to search them. They were prepared to search vehicles based on their hunch of illegal activity being afoot. Not even *Terry* or *Adams,* supra, would allow a search based on the facts and inferences known to these Agents.

These are the Agents who think that the alien traffic will take place near a weekend and do not go to the area the weekend of Sunday, January 23rd. We are given no explanation as to why they skipped this weekend and instead waited two weeks. These are the Agents that arbitrarily excluded sedans and commercial vehicles from the types of vehicles they intended to stop and search, and are the same Agents who were making no effort to determine if vehicles were loaded down and heavy with the weight of eight to twenty aliens before stopping them. These are the Agents that made no effort to check for fresh alien tracks for the two weeks from January 16th to January 31st. These are the Agents who used their unbridled discretion for this stop and proposed search. The possibility of catching some aliens cannot justify the actions of the Agents which where based on hunches and assumptions that were not backed by facts.

If the Agents were sure that the pickup would take place at milepost 122 then their scope should have been narrowed so to only take in the area between milepost 119 and 122. The Agents could have set up around milepost 122 and then have watched for vehicles making

the round-trip in a few minutes. This narrowing of the area would certainly give more credence to their statement that they were sure chevron would be leading illegal aliens from the border to milepost 122, and by doing this they would have excluded many innocent users of the highway from being stopped and intruded upon.

The Government is correct when it says that founded suspicion can be obtained from circumstantial evidence. However, they make the mistake of confusing circumstantial evidence with hunches. Hunches do not equal a founded suspicion.

CONCLUSION

The Judgment of the Court of Appeals should be affirmed. If it is not, this case should be remanded to the Court of Appeals for a decision on the issue regarding the 'mandacity' instruction.

Respectfully submitted,

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